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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RICARDO B. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JOSE E.,

Defendant and Appellant.

D061168

(Super. Ct. No. SJ12243A-C)

APPEAL from orders of the Superior Court of San Diego County, Garry G.

Haehnle, Judge. Affirmed.

Jose E. appeals juvenile court orders terminating his parental rights to his minor children, Ricardo B., Cynthia B. and Juan B., under Welfare and Institutions Code

section 366.26.¹ Jose challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating his parental rights. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2009, eight-year-old Ricardo, six-year-old Cynthia and one-year-old Juan (collectively the minors) became dependents of the juvenile court under section 300, subdivision (b), and were removed from parental custody based on findings Jose and the minors' mother, Eileen B.,² failed to provide them with required medical treatment. Cynthia had a serious skin condition that was spreading, and Ricardo and Juan had no medication for their asthma. The court placed the minors in out-of-home care and ordered Jose to participate in reunification services, including individual counseling, in-home support services and a parenting class.

During the next six months, Jose had regular supervised visits with the minors. Jose's interaction with the minors was loving and appropriate. Lourdes Elkins, the social worker for the San Diego County Health and Human Services Agency (Agency), reported Jose was complying with his case plan and making progress, but his lack of insight into the minors' needs continued to place the minors at risk. At a six-month review hearing, the court continued the minors in out-of-home care and ordered six more months of services for Jose.

¹ Statutory references are to the Welfare and Institutions Code.

² Eileen has not appealed.

Jose was making progress in therapy. His supervised visits with the minors continued to be consistent and appropriate. Visits became unsupervised and progressed to overnight.

In October 2010, the minors' foster mother reported Ricardo and Cynthia returned from an unsupervised visit with bruises. They said Jose was hitting them and they were afraid of him. Ricardo told Elkins that Jose hit him with a rope, causing bruises on his legs. Jose threatened to kill himself if Ricardo told Elkins what was happening at home. Ricardo was afraid Jose would follow through on his threat because he had a rifle, two switch blades and several machetes at home. Cynthia said Jose had not hit her, but he screamed at her and she was afraid of him. Elkins also learned Jose had caused a bruise on Juan's leg because Juan cried too much. The minors said they were afraid of Jose because he was abusing their mother, and they did not want to live with him.

Eileen admitted Jose had been physically abusing the minors and exposing them to domestic violence. When Elkins interviewed Jose about these allegations, he became upset, adamantly denied them and demanded to confront Ricardo about what he had said. Jose screamed at Elkins and threatened to commit suicide when she informed him that he needed to move out of the home before the minors could be returned, and that visits would revert to supervised. Although Elkins believed Jose continued to place the minors at risk, she recommended further services for him.

Elkins then changed her recommendation for further reunification services after learning that during a recent supervised visit between the parents and the minors, Jose became angry at the minors' foster mother and screamed obscenities at her, causing the

minors to cry and become frightened. Jose stormed out, leaving Eileen without transportation home. Eileen said Jose threatened to kill her, the foster mother, Elkins and the maternal grandmother if the minors were not returned to him. Eileen's therapist reported the minors remained at risk of abuse as long as Eileen and Jose continued their relationship.

In Elkins' opinion, Jose continued to lack appropriate parenting skills as shown by his physical abuse of the minors and the domestic violence that occurred in the minors' presence. Jose's threats to kill people if the minors were not returned to him showed his disturbed mental process and need for psychiatric help. Elkins believed Jose did not understand the minors' emotional needs and he was not capable of caring for or protecting the minors. Thus, there was no substantial probability the minors would be returned to Jose's custody by the next hearing.

At a contested 12-month hearing, the court admitted in evidence the following stipulated testimony of Ricardo: Jose frequently hit Ricardo with his hand, a whip and another object that caused a bruise on his leg. Jose told Ricardo not to tell anyone, including Elkins, about the physical abuse. Jose also hit Cynthia and Juan, but not as often as he hit Ricardo. Ricardo was afraid of Jose and did not feel safe with him. Before Ricardo was removed from his parents' custody, he saw Jose use marijuana. Ricardo would like to live with Jose only if he was not physically abusive and did not use drugs.

Elkins testified Jose received services that should have prevented him from physically abusing the minors. Jose had not ensured the minors had access to medical

care, even after Elkins emphasized the importance of doing so. Jose did not seem to understand the minors' medical conditions or what was needed to treat them. In Elkins's opinion, Jose had not progressed with his case plan, and the risk of returning the minors to his custody was very high.

After considering the evidence and arguments of counsel, the court terminated services and set a hearing under section 366.26 to select and implement a permanent plan for the minors. The court also issued a restraining order preventing Jose from having contact with Elkins and the foster mother.

In an assessment report, social worker Melissa Rodriguez noted Jose had not maintained regular contact with the minors between December 2010 and April 2011, having visited them only twice. Rodriguez described the visits she supervised in February and March 2011 as appropriate. The minors greeted Jose with hugs and seemed to enjoy their interaction with him. They hugged him goodbye and had no negative reaction to leaving the visit.

Rodriguez assessed the minors as generally and specifically adoptable. The minors had a strong attachment to the maternal grandparents, whose home in China was being assessed for placement. The grandparents loved the minors and wanted to provide them with a stable home through adoption. The minors were happy with the plan of being adopted by the grandparents.

Between April and September 2011, Jose maintained fairly regular contact with the minors. Supervised visits were appropriate, with Jose engaging the minors in play and showing interest in their activities. Although the minors enjoyed the visits, they had

no negative reactions when visits ended. In Rodriguez's opinion, the minors and Jose had a relationship, but the minors' interaction with him was similar to the interaction they had with other people in their lives, such as the foster parents. Jose had not been able to consistently meet the minors' needs. Although the minors would miss having visits with Jose if parental rights were terminated, adoption would provide the minors with permanence and a safe, stable family setting. Any parent-child relationship between Jose and the minors was not so strong as to outweigh the benefits the minors would receive through adoption.

In updated addendum reports, Rodriguez noted Jose had been more consistent with supervised visits in the last three months. Jose interacted appropriately with the minors, took on an appropriate parental role and showed adequate parental supervision. The minors greeted Jose with excitement and hugs, and appeared comfortable with him. With the exception of one visit, the minors were able to leave with no negative reactions.

Rodriguez reported Jose had not been forthcoming about his continued contact with Eileen. Although Jose was now attending weekly visits with the minors, he had not participated in any additional services and was still not in a position to parent, care for, or meet the basic needs of the minors.

At a selection and implementation hearing, the court received in evidence Agency's reports. After hearing arguments of counsel, the court found the minors were likely to be adopted if parental rights were terminated and none of the exceptions to adoption applied. The court terminated parental rights and referred the minors for adoptive placement.

DISCUSSION

Jose challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating his parental rights. He asserts he maintained regular visitation and contact with the minors, who would benefit from maintaining their relationship with him.

A

After reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interests of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1320.) "The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because

a selection and implementation hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if terminating parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811; *In re Jason J.* (2009) 175 Cal.App.4th 922, 936-937.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936-937; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a parental role in the

child's life, resulting in a significant, positive emotional attachment from child to parent. (*In re Derek W.*, *supra*, at p. 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review the court's finding regarding the applicability of a statutory exception to adoption for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In this regard, we do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) On appeal, the parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Here, the record shows Jose regularly visited the minors from the time they were removed from his custody until his reunification services were terminated. The frequency of Jose's visits, however, then began to decline. He visited the minors only twice between December 2010 and April 2011. He then visited them seven times in the next six months, with no visits occurring the entire month of July. Only during the five weeks before the selection and implementation hearing did Jose engage in regular one-hour visits. Even were we to consider these visits to be "regular" within the meaning of the statute, Jose did not meet his burden of showing he had a beneficial parent-child relationship with the minors so as to overcome the legislative preference for adoption.

Although the interaction between Jose and the minors during supervised visits was loving and appropriate, Jose did not consistently relate to the minors as a parent. When visits were unsupervised, Jose physically and emotionally abused the minors, causing them to fear him and feel unsafe with him. The minors were also afraid for their mother's safety after witnessing domestic violence between Jose and Eileen. Jose threatened to kill himself if the minors were not returned to his custody as a result of the minors disclosing the abuse that occurred at home. Thus, Jose abdicated his parental role during times of unsupervised contact with the minors.

Moreover, the manner in which the minors related to Jose during supervised visits was similar to the manner in which they related to other people. The minors were happy to see Jose, but separated easily from him at the end of visits and suffered no adverse effects due to his absence from their daily lives. Indeed, an inference can be drawn that the minors enjoyed seeing Jose only in a controlled setting that afforded them a sense of safety. The minors did not have a "significant, positive, emotional attachment" to Jose such that terminating parental rights would result in *great harm* to them. (*In re Jason J.*, *supra*, 175 Cal.App.4th at p. 936; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

At the time of the selection and implementation hearing, ten-year-old Ricardo, eight-year-old Cynthia and three-year-old Juan had been out of Jose's custody for more

than two years. The minors were in need of a stable, secure and permanent home. They had a strong attachment to the maternal grandparents, who were committed to adopting them. The minors were happy with the plan of adoption by their grandparents. The court was entitled to accept the social worker's opinion that the benefits of adoption for the minors outweighed the benefits of maintaining a relationship with Jose. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 191 [child's interest in stable and permanent home is paramount once a parent's interest in reunification is no longer at issue].) We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) The minors, whose needs could not be met by Jose, deserve to have their custody status promptly resolved and their placement made permanent and secure. Substantial evidence supports the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating parental rights.

DISPOSITION

The orders are affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.